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NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MICHAEL PHILLIP DUNIVANT,
EDGAR LEE ANTHONY and
MERRILL JAYE LIVINGSTON,

Petitioners,

vs.

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF GEORGIA

[redacted]

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QUESTION PRESENTED FOR REVIEW

1. WHETHER PETITIONERS WERE DENIED THEIR FOURTH AMENDMENT RIGHT TO BE SECURE FROM UNREASONABLE SEARCHES AND SEIZURES WHEN, THE POLICE, ABSENT EXIGENT CIRCUMSTANCES, INSTALLED AND MONITORED AN ELECTRONIC TRACKING DEVICE IN PETITIONERS' NON-CONTRABAND PERSONAL PROPERTY WITHOUT OBTAINING A SEARCH WARRANT.

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BRIEF OF PETITIONERS

The Petitioners, Michael Phillip Dunivant, Edgar Lee Anthony and Merrill Jaye Livingston, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the State of Georgia.

OPINIONS BELOW

On September 10, 1980, the Georgia Court of Appeals rendered a decision affirming the conviction of Petitioners in a non-jury trial and Motion to Suppress hearing con-

ducted simultaneously. See Appendix A. Petitioners filed an Application for Writ of Certiorari in the Supreme Court of Georgia on October 20, 1980, and the Application was denied on November 5, 1980. See Appendix B. A Motion for Reconsideration was denied in the same Court on November 25, 1980. See Appendix C.

JURISDICTION

Jurisdiction of the appeal is grounded in a September 10, 1980 decision of the Georgia Court of Appeals. The statutory provision conferring jurisdiction for this appeal is 28 U.S.C. §1257.

CONSTITUTIONAL PROVISION INVOLVED

Fourth Amendment, United States Constitution:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioners were charged with possession of methamphetamine, a Schedule II controlled substance, in violation of the Georgia Controlled Substances Act. Petitioners filed a Motion to Suppress all evidence seized and the fruits thereof as a result of an unlawful search and seizure in violation of the Fourth Amendment.

On October 8, 1979, Petitioners waived their right to trial by jury and the Motion to Suppress and non-jury

trial were heard simultaneously before the Court. The Motion was denied and Petitioners were found guilty. Each was sentenced to four years incarceration.

An appeal was taken to the Court of Appeals of the State of Georgia raising the question whether Petitioners Fourth Amendment rights were violated. On September 10, 1980, Petitioners' convictions were affirmed by the Court of Appeals. A motion for rehearing En Banc was denied on September 30, 1980.

Petitioners filed an Application for Writ of Certiorari in the Supreme Court of Georgia; the Application was denied on November 5, 1980. Petitioners' Motion for Reconsideration was similarly denied by that Court on November 25, 1980.

Petitioners respectfully submit the following chronology with respect to the question presented:

Steven Starling, an agent of the Drug Enforcement Administration (DEA) (R. 11), was informed by an employee of Scientific Products, a chemical supply company located northeast of Atlanta, that certain chemicals and equipment were purchased on February 28, 1979 by an "individual" representing Anthony and Associates (R. 24-25). Starling, however, did not learn of this purchase until June, approximately four and a half months later (R. 28-29).

The State contended that the chemicals ordered from Scientific Products were the necessary precursor chemicals for the illegal manufacture of methamphetamine. A critical component of the methamphetamine formula, benzyl chloride, was not in stock in February 1979, and was back ordered (R. 35, 37). The invoice listed Anthony

and Associates as purchaser and delivery was to be made to 3906 Commander Drive, Chamblee, Georgia (R. 30).

Beginning on June 1, 1979, and continuing for a period of several days, Starling conducted a physical surveillance of a house at the Commander Drive address (R. 30). The surveillance consisted only of driving by the front of the house and remaining in the car (R. 32). None of the three Petitioners were ever seen in or about the premises and none of the chemicals listed on the Scientific Products invoice were ever seen by the surveillance team (R. 31).

Starling testified that between the period of February 28, 1979, and June 1, 1979, he could not specify what had happened to any of the chemicals. He stated that they were delivered to Commander Drive in February, but that he had no knowledge of what may have happened to them subsequently, or if in fact they were still in existence anywhere (R. 33-34).

Sometime around the first of July, Starling received information from Scientific Products that someone from Anthony and Associates would be coming to pick up the previously back-ordered chemical, benzyl chloride (R. 35, 37). Benzyl chloride is not a controlled substance, and by itself cannot produce methamphetamine (R. 36). A stake-out of Scientific Products, which was to last about two weeks, was established (R. 35, 37).

Permission was obtained from Scientific Products to put audio transmitters into three benzyl chloride boxes that would be ultimately purchased by *someone* from Anthony and Associates (R. 18, 37). The electronic transmitting devices ("ETD") worked by means of a periodic "beep" which would occur every two seconds. The beep was monitored by the DEA with an electronic tracking

device ("ETD") as an audio signal and as a blinking signal. An indicator needle on the ETD also measured its distance from the transmitter and the direction of the signal (R. 18-19).

The electronic transmitters were implanted in the boxes by DEA Technical Operations Officer, Tom Kiser (R. 40), where they remained for the two-week surveillance period, being activated each morning and deactivated at the close of business each evening (R. 40, 50-51). A DEA airplane and pilot were standing by at Peachtree-DeKalb Airport, approximately five to ten miles from Scientific Products during this entire period of surveillance (R. 43, 50).

On July 11, 1979, during the course of the two-week stake-out, Starling observed Petitioner Anthony arrive at Scientific Products to purchase the benzyl chloride (R. 37-38). It was late in the afternoon and Scientific Products was unable to verify the check given in payment for the chemicals; the transaction was, therefore, not completed on that day (R. 38-39). No search warrant was sought or obtained on July 11th or thereafter.

On the following day, July 12, 1979, Petitioner Dunivant arrived at Scientific Products in a 1977 Chevrolet Blazer; Starling was across the street (R. 39-40) and observed Petitioner Dunivant load the cartons containing benzyl chloride (and the hidden transmitters) into the Blazer (R. 43). Petitioner Dunivant had no knowledge that the ETDs were implanted in the cartons in his vehicle (R. 44). Still no warrant had been obtained.

The transmitters were activated (R. 41), and when Petitioner Dunivant left the Scientific Products location, he unknowingly was being followed by a surveillance

team consisting of five to seven automobiles belonging to the DEA, Georgia Bureau of Investigation and DeKalb County Police (R. 41). Agent Kiser's vehicle contained an ETD that would follow the beeps transmitted from the cartons (R. 46). A second ETD to monitor beeps from the transmitter had been placed in the airplane (R. 42, 47, 48). All surveillance vehicles and the airplane had radio contact with one another (R. 17, 42, 47).

The surveillance team maintained radio contact with Kiser, as well as with the airplane (R. 42). Both Kiser and the airplane pilot reported these transmitter signals to the ground vehicles (R. 47).

The unmarked police vehicles continued to follow the Blazer west on Interstate 20, and after a brief stop they proceeded toward Carroll County, Georgia (R. 45, 47), a distance of approximately 40 miles.

It was in Carroll County, approximately one hour later, that Petitioner Dunivant left the interstate and turned his vehicle onto a dirt road. The area was dense with trees (R. 47). At that point, *everyone in the surveillance team lost visual contact with the Blazer* (R. 18, 47-48). The airplane made several passes over the area from different directions but was prevented by the dense trees from seeing the ground (R. 48). The dense tree cover, however, did not prevent the pilot from picking up the beeping signals from Petitoner Dunivant's vehicle (R. 48). In fact, Starling testified that it was the pilot's radio transmissions that led the agents up the dirt road to the vicinity of the Blazer (R. 48). This crucial testimony was corroborated in full by Dan Golden, Special Agent with the Georgia Bureau of Investigation. Golden also was in the surveillance team that followed Petitioner Dunivant from Scientific Products to Carroll County (R. 66).

Golden testified that for a period of about five minutes, the surveillance team completely lost contact with the Blazer (R. 74).

Using the beeper information from the pilot, the agents proceeded along the dirt road and eventually saw the Blazer parked at a remote private residence (R. 48, 54).

Starling and Golden then went to the Carroll County Sheriff's office where they executed affidavits in support of a warrant to search the residence on Black Dirt Road.

After the warrant was obtained, Golden returned to the residence, a predetermined signal was given, and the agents all converged on the house (R. 21, 70) where Petitioners Anthony, Dunivant and Livingston were arrested.

Methamphetamine and other chemicals found during the search were admitted in evidence subject to the Court's ruling on the Motion to Suppress (R. 80). Objection was made to their admissibility as fruits of the illegal search (R. 80). This evidence was ultimately admitted when the Motion to Suppress was denied. Jury trial was waived, and Petitioners were found guilty by the Court.

REASONS FOR GRANTING THE WRIT

EXPLICATION IS REQUIRED TO DECIDE AN IMPORTANT CONSTITUTIONAL QUESTION OF FIRST IMPRESSION IN THIS COURT: WHETHER THE WARRANTLESS, NON-CONSENSUAL IMPLANTATION OF AN ELECTRONIC TRACKING DEVICE WITHIN NON-CONTRABAND PERSONAL PROPERTY PLACED INSIDE PETITIONER'S VEHICLE, AND THE SUBSEQUENT TRACKING OF

THAT DEVICE TO A PRIVATE RESIDENCE CONSTITUTES A SEARCH AND SEIZURE WITHIN THE MEANING OF THE FOURTH AMENDMENT. MOREOVER, EXPLICATION IS NECESSARY BECAUSE THE DECISIONS OF THE CIRCUIT COURTS OF APPEAL ARE IN DIRECT CONFLICT, AS ARE THE DECISIONS OF THE STATE APPELLATE COURTS.

A. Federal Courts of Appeal have rendered directly conflicting decisions.

The Ninth Circuit Court of Appeals has consistently held the warrant requirement to be inapplicable in the use of an electronic tracking device. *United States v. Hufford*, 539 F.2d 32 (9th Cir. 1976), *cert. denied*, 429 U.S. 1002 (1977); *United States v. Botero*, 589 F.2d 430 (9th Cir. 1978), *cert. denied*, 441 U.S. 944 (1979).

The First Circuit similarly has held that a warrant is not required in the implantation and monitoring of an electronic tracking device where there is no more than a minimal intrusion in the right of privacy enjoyed by the individual. *United States v. Moore*, 562 F.2d 106 (1st Cir. 1977), *cert. denied*, 435 U.S. 926 (1978).

Conversely, the Court of Appeals for the Fifth Circuit has held that an electronic tracking device should be categorized as a "search," implicating Fourth Amendment protections, and that a warrant must be obtained before the government may install an ETD on a vehicle. *United States v. Holmes*, 521 F.2d 859 (5th Cir. 1975), *aff'd en banc by an equally divided court*, 537 F.2d 227 (1976).

More recently the *Holmes* decision was again followed by the Fifth Circuit in *United States v. Michael*, 622 F.2d

744 (1980), where it was held that, absent exigent circumstances, a warrant issued with judicial approval is required before governmental agents may attach an ETD to a privately owned vehicle without the consent of the one entitled to give it. On motion by the government, the *Michael* court granted rehearing *en banc* to again examine this issue. (Slip Opinion 79-2679 October 7, 1980).[1]

Similarly in *United States v. Bailey*, 628 F.2d 938 (6th Cir. 1980), the Sixth Circuit Court of Appeals held that Fourth Amendment standards govern surveillance by means of an implanted ETD. Factually, *Bailey* is closely analogous to the instant case. An informer told the DEA that the defendant wanted to purchase chemicals for the manufacture of an illegal drug. Two agents posed as chemical suppliers, and agreed to deliver the requested chemicals. Prior to the delivery, the agents obtained a warrant authorizing the installation of a beeper in one of the drums of chemicals, delivered the chemicals, and then monitored the beeper's signal. Surveillance led the agents to the chemicals containing the homing beeper device. The defendant challenged the validity of the warrant on the ground that the warrant contained no time limits. The district court agreed, and suppressed the evidence. The Sixth Circuit affirmed, holding that the monitoring of the beeper violated the defendant's legitimate expectation of privacy, and rejecting the government's claim that Fourth Amendment standards did not govern surveillance by way of an implanted beeper. The Court held that *Katz v. United States*, 389 U.S 347 (1967) and its progeny make clear that the Fourth Amendment protects an individual's subjective expectation of privacy

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[1] Oral argument was presented to the Fifth Circuit Court of Appeals *en banc* on January 13, 1981. A decision has not yet been rendered.

in his activities so long as society regards that expectation as a legitimate one.

The *Bailey* Court stated that the defendants satisfied both components of the *Katz*-based test. First, they exhibited a subjective expectation of privacy with respect to the chemical drum by handling it discreetly and placing it in an apartment. Second, the law recognizes as legitimate an individual's expectation of privacy in non-contraband personal property, such as the chemical drum, which he uses in private. The Court further held that the government could consent to the warrantless installation and monitoring only so long as it had possession of the chemicals. At the point of transfer, any governmental consent became ineffectual:

> The consent of the government could not satisfy the Fourth Amendment *after ownership and control of the chemicals passed to the defendants.* The government's proposed expansion of the consent exception would allow warrantless installation and monitoring of beepers or even radio transmitters in any property the government might decide to sell. (Emphasis added). *Bailey, supra,* at 943 (fn. 7).

In the case at bar, the beeper was surreptitiously placed in *non-contraband property.* Petitioner Dunivant securely placed the chemicals in the back of the Blazer, and, believing he was alone, traveled to a remote area of Carroll County. Here, as in *Bailey,* Petitioner Dunivant clearly exhibited a subjective legitimate expectation of privacy. At the time the benzyl-chloride was transferred from the chemical company to Petitioner Dunivant, any consent by the DEA, government, State or chemical company became ineffectual *and a trespass was committed.* The reliance upon the beeper to track Petitioner's prop-

erty into the house on Black Dirt Road was a clear infringement upon Fourth Amendment rights.

Thus, the conflict in the decisions of the Circuit Courts of Appeal is clear, making the instant case ripe for review by this Court.

B. State Court decisions are in conflict.

The decision of the Georgia Court of Appeals in the case *sub judice* is directly in conflict with a closely analogous decision of a sister State, *State of North Carolina v. Hendricks*, 258 S.E.2d 872 (1979). The *Hendricks* Court, noting that the ETD issue has never been directly addressed by this Court and that the decisions of the Federal Circuit Courts were in conflict, felt compelled to extensively discuss the implications of the use of the ETD. The attachment and monitoring of the beeper without judicial approval were severely criticized:

> We stress that the presence of a beeper on one's person, in one's personal effects, in one's vehicle, or in one's home, is not a minimal intrusion. The presence of a beeper, in effect, transforms private property into an instrument of surveillance, a surrogate police presence, a use unintended by the original owner. Moreover, the continuing presence of the beeper is not a mere technical trespass, but an extended physical intrusion: they continually broadcast the message, 'Here I am.' In sum, these 'uninvited shadowers' pierce one's privacy of location and movement, as well as one's rights to protection of property against physical invasion. (At 878).

The Court concluded that attachment and use of the beeper constituted a continuing "search." Therefore, in order to find the search reasonable within the context of the Fourth Amendment, a warrant issued by an independent magistrate was required.

Hendricks, supra, and the instant case are directly in conflict. Thus, this important question of federal law should be decided by this Court.

C. The issue of the ETD raises important Constitutional questions which have not previously been settled by this Court.

This Court has not yet decided the Fourth Amendment implications involved in the use of an ETD. Consequently our Federal Circuit Courts of Appeal and State Appellate Courts have been compelled to apply analogous Supreme Court law. In doing so, they have reached divergent conclusions. (The Fifth and Sixth Circuits have analogized to *Katz v. United States, supra,* while the First and Ninth Circuits have rejected the applicability of *Katz*).

Beeper cases have been appearing with increased frequency during the last five years. Several categories of ETD use have emerged:

1. The placement of an ETD in contraband: this question is consistently resolved by appellate court decisions, holding that there is no legitimate expectation of privacy in contraband and, therefore, the installation of the device is not a "search." See: *United States v. Dubrofsky,* 581 F.2d 208 (9th Cir. 1978); *United States v. Botero, supra; United States v. Fringle,* 576 F.2d 1114 (5th Cir. 1978); *United States v. Emery,* 541 F.2d 887 (1st Cir. 1976); *United States v. Perez,* 526 F.2d 859 (5th Cir. 1976), *cert. denied,* 429 U.S. 846 (1976).

2. Attachment of beepers to airplanes with consent of the owner of the plane: Appellate courts have consistently held that this comes within the third party consent exception to the warrant requirement or that monitoring of the plane's movements did not intrude on any reasonable

expection of privacy. See: *United States v. Miroyan*, 577 F.2d 489 (9th Cir. 1978), *cert. denied*, 439 U.S. 896 (1979); *United States v. Curtis*, 562 F.2d 1153 (9th Cir. 1977), *cert. denied*, 439 U.S. 910 (1979); *United States v. Cheshire*, 569 F.2d 887 (5th Cir. 1978), *cert. denied*, 437 U.S. 907 (1978); *United States v. Bruneau*, 594 F.2d 1190 (8th Cir. 1979).

3. Situations involving sufficient exigent circumstances and probable cause to eliminate the warrant requirement: *United States v. Shovea*, 580 F.2d 1382 (10th Cir. 1978), *cert. denied*, 440 U.S. 908 (1979); *United States v. Frazier*, 538 F.2d 1322 (8th Cir. 1976), *cert. denied*, 429 U.S. 1046 (1977).

4. Situations (as the instant case) wherein the Court had to determine whether the use of the ETD constituted a "search." This is where the case law is in conflict. *United States v. Holmes, supra; United States v. Moore, supra; United States v. Hufford, supra.*

It is this last category that requires direction and definition from this Court. As methods of law enforcement surveillance become increasingly sophisticated, guidelines must be set that will consistently comport with our Constitutional safeguards. It is entirely illogical to permit a federal narcotics agent to track a suspect by means of a warrantless ETD in the State of Massachusetts (*United States v. Moore, supra*) and to disallow such activity in Michigan (*United States v. Bailey, supra*). Moreover, to permit state authorities to *unlawfully* follow a vehicle from North Carolina into Georgia by means of a beeper and ETD and then *lawfully* apprehend the driver in Georgia is giving a law enforcement officer the same authority and discretion as should be reserved for a neutral and detached magistrate.

CONCLUSION

It is clearly appropriate and necessary that the issue of the warrantless implantation and monitoring of an ETD in non-contraband personal property be addressed by this Court.

Although certiorari has been consistently denied in other "beeper" cases, the instant case falls within the category that has been the subject of conflicting federal and state case law.

As this Court recently perceived the need to decide the unique Fourth Amendment issue raised in *United States v. Reid*, ____ U.S. ____, 100 S.Ct. 2752, 65 L.Ed2d ____ (198 (per curium), and *United States v. Mendenhall*, 444 U.S. 822 (1979), so should this "new" Fourth Amendment issue be addressed by the Court so that law enforcement officials are given proper direction. The ETD raises questions of similar Fourth Amendment scope and significance.

The Court should be concerned with providing guidance to law enforcement officials who are often zealously engaged in the competitive enterprise of uncovering crime. Officers cannot be given carte blanche to determine the amount of intrusion and degree of expected privacy to which a citizen should be entitled prior to installing an electronic tracking device.

As the *Holmes* Court aptly stated:

> Without intending to imply that the use of the beacon without judicial supervision is anything less than obnoxious and repulsive, we think the Supreme Court's early admonition bears repeating:
>
> > It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first foot-

> ing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.

Boyd, supra, 116 U.S. at 635, 6 S.Ct. at 535, 29 L.Ed. at 752. If this conduct is held to be outside the reach of the Fourth Amendment, there is nothing to forestall the implanting of a similar device on one's person, and this on no greater grounds than existed in the present case: the merest of suspicions . . . .

> It must be remembered that,
>
> [T]he Bill of Rights, of which the Fourth and Fifth Amendments are a part, was incorporated into the Constitution in an effort to give the courts of this country the authority, in James Madison's immortal phrase, 'to oblige the government to control itself.' (Footnote omitted). *Brock v. United States,* 5 Cir. 1955, 223 F.2d 681, 684.

The genius of the founding fathers lies in their development of an instrument capable of matching ingenius attempts of the government to outflank its protections. *Holmes, supra,* at 866.

Based on the foregoing reasons, Petitioners pray that a Writ of Certiorari should issue to review the judgment of the Georgia Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served two copies of the within and foregoing Petition for Writ of Certiorari upon the Attorney General, State of Georgia, State Judicial Building, Capitol Square, Atlanta, Georgia; and upon the District Attorney of the Coweta Judicial Circuit, Carroll County Superior Court, 21 Spring Street, Newnan, Georgia 30264, by depositing same in the United States Mail in properly addressed envelopes with adequate postage thereon.

This the 23rd day of January, 1981.

MARK J. KADISH

Appendices

APPENDIX A

September 10, 1980

59837.	DUNIVANT v. THE STATE	(Bi-91)
59838.	ANTHONY v. THE STATE	(Bi-92)
59839.	LIVINGSTON v. THE STATE	(Bi-93)

BIRDSONG, Judge.

Search and seizure. The appellants, Dunivant, Anthony and Livingston, were tried jointly and convicted of a violation of the Georgia Controlled Substances Act (possession of methamphetamine) and each sentenced to serve four years. Each appellant enumerates as error the denial of a motion to suppress the fruits of an illegal search and their subsequent conviction based upon the evidence of drugs seized from their persons and presence.

The relevant facts show that a firm representing itself as Anthony and Associates placed an order with Scientific Products, a chemical supply company, for certain chemicals and equipment such as burners and beakers used in manufacturing chemical compounds. Most of the chemical substances and equipment was delivered to Anthony and Associates at an address in Chamblee in February, 1979. However, one of the chemicals ordered was not available and was back ordered by Scientific Products. The back ordered chemical was received by Scientific Products in late May or early June, 1979, and because the chemicals were specific for the manufacture of methamphetamine, and apparently in accordance with instructions from the U. S. Drug Enforcement Agency, Scientific Products about June 1, 1979 telephonically notified an agent of the DEA that someone from Anthony and Associates had ordered chemicals useful in the manufacture of methamphetamine. The DEA agents also were informed that

one substance essential in the compounding of methamphethamine (benzyl-chloride) had not been available and had been back ordered. Further, though it is not clear, there appears to have been two boxes of benzyl-chloride in the back order. When the chemical was received and at the directions of the DEA, an electronic "beeper" was placed in each box of benzyl-chloride. Delivery was to be effected to the purchaser about July 1. After July 1, the beepers were activated each morning and deactivated each evening by an agent of the DEA pending the pick-up by someone from Anthony and Associates.

In early June, the Chamblee address had been placed under surveillance and it appeared to be a residence, not usable as a manufacturing site. Commencing on July 1, agents of the U. S. and state DEA and G. B. I. placed the business premises of Scientific Products under surveillance and maintained that surveillance for about two weeks. A DEA airplane and pilot were standing by at a nearby airport and five to seven vehicles were on call to assist in a "tail" of any vehicle used to pick up the benzyl-chloride.

On July 11, the appellant Anthony appeared at Scientific Products to accept delivery of the chemical. Anthony attempted to pay for the chemical by check and delivery was refused. The next day Dunivant appeared with cash and accepted delivery of the benzyl-chloride, with the beepers activated in the boxes. The chemical voluntarily was placed into a 1977 Chevrolet Blazer by Dunivant who was not aware of the presence of the beepers. Dunivant then proceeded in a westerly direction toward Carrollton. Five to seven police cars were engaged in keeping the Blazer under constant surveillance with the cars rotating as "point" vehicle so that Dunivant would not be aware that he was being followed. The plane was called into the

surveillance and kept the Blazer under constant observation on the trip into Carroll County. One of the tailing vehicles had a receiving device as did the aircraft. All vehicles and the plane were in communication with each other. The Blazer was kept in constant visual surveillance until Dunivant turned off the paved highway onto a dirt road in rural Carroll County. At that time because of heavy tree foliage alongside the roadway, the plane and the other vehicles lost contact with the Blazer for approximately five minutes. The plane, however, could hear the beeper. In effect, by triangulating flights over the wooded area, the plane isolated the sound to an area of about 100 yards. Physical surveillance up the road by DEA and G. B. I. agents established that the sound had to be coming from one of two houses on the heavily wooded roadway. Closer observation disclosed the Blazer parked at one of these houses. Based upon the location of the Blazer and the fact that it apparently had arrived at its destination, the officers proceeded to Carrollton and obtained a search warrant for that particular house. Armed with the warrant, the officers returned to the house and in a small building immediately adjacent to the described house, the officers observed one of the appellants in an open doorway, one holding a beaker over a heat source and the other stirring something in the beaker. This substance was seized and subsequently proved to be methamphetamine. The warrant described and sought to seize not only the benzyl-chloride but the chemicals purchased and delivered in February.

Each appellant argues that the emplacement of the beepers in the benzyl-chloride constituted a search and that search required a first warrant which admittedly was not procured. They further complained that the ultimate

search warrant issued in Carrollton was based upon misleading information in that no mention was made of the use of an electronic beeper and the affiant averred only that the Blazer had been under constant surveillance from the time it left Atlanta until the time it arrived at the house in Carroll County. Lastly, each appellant argues that the information in the warrant was stale because no evidence was offered to show continuously the whereabouts of the chemicals and equipment purchased in February, which were alleged in the warrant to be part of what was sought to be seized. *Held:*

1. Appellants contend that the insertion of the beepers into the boxes of chemicals constituted a search which falls within the ambit of the Fourth Amendment. In support of this contention, they cite U. S. v. Holmes, 521 F2d 859, 864-867 (5th Cir. 1975) and State v. Hendricks, 43 N. C. App. 245 (258 SE2d 872) (1979).

We are confronted in this state with a question of first impression. However, commencing in about 1975, the federal courts have repeatedly been confronted with similar questions. One of the earliest cases was the Fifth Circuit case of United States v. Holmes, supra. That case involved the non-consensual emplacement of a beeper upon a suspect's car while it was parked in a parking lot and the following of the car by use of the beeper. The court held the emplacement of the beeper to be a search accomplished by a trespass. The Fifth Circuit court concluded as a matter of policy that the interest to be protected was not the car itself but the expectation of privacy that the owner of an automobile has while operating his automobile even upon the public roads. The federal court relied heavily on the Supreme Court's holding in Katz v. United States, 389 U. S. 347 (88 SC 507, 19 LE2d 576)

(1967), and held that the use of a beeper was a search protected by the Fourth Amendment and that an order was required before a beeper could be used, balancing the right of the public to freedom from drug traffic against the right of privacy of the individual and holding that these conflicting rights had to be weighed by an impartial magistrate and not by the officers seeking to ferret out the suspected crime. Thus, Holmes equated the use of a beeper to a telephone tap. In Hendricks, supra, a North Carolina court adopted the same rationale. A similar opinion was rendered by the District Court of Massachusetts in United States v. Bobisink, 415 FSupp 1334, 1338 (D Mass 1976).

However, the rationale of the Bobisink case and Holmes (though Holmes was not cited as such) was rejected by the First Circuit in an appeal of Bobisink, sub nom, United States v. Moore, 562 F2d 106 (1st Cir. 1977). As in United States v. Moore, supra, during the years 1977-1979, the privacy argument has yielded to the proposition that the public has the right to expect the state to protect its citizens from the flow of illicit drugs and to enforce the criminal law so long as there is no more than a minimal intrusion in the right of privacy enjoyed by the individual. Thus, in United States v. Dubrofsky, 581 F2d 208 (9th Cir. 1978), it was held that the mere insertion of a beeper device does not violate any Fourth Amendment right where there is probable cause to believe a crime is intended. Nor was the mere presence of the beeper such an impermissible intrusion as to constitute a search. If all it does is reflect that a package is at a certain location, it is the equivalent of an extension of a surveilling officer's senses and their unaided physical abilities. Such a limited intrusion does not require an antecedent justification. See

Dubrofsky, supra, p. 211 (5). In United States v. Botero, 589 F2d 430 (9th Cir. 1978) (cert denied, 441 U. S. 944 (99 SC 216, 60 LE2d 1045)), the Ninth Circuit reaffirmed its conclusion that the insertion of a beeper was not a "search."

We note that many of the cases considering this question deal with the insertion of a beeper into contraband (i. e., drugs legally opened by the postal authorities, resealed with a beeper, and when the addressee takes possession, the following of the addressee to the final location). These cases generally tend to hold that the addressee has no expectation of privacy in contraband. See United States v. Bruneau, 594 F2d 1190 (8th Cir. 1979) as an example. Also a number of these cases involve the emplacement of a transponder or beeper on leased aircraft illegally importing marijuana or cocaine into the United States from Mexico or Columbia. Illuminating language can be paraphrased from United States v. Miroyan, 577 F2d 489, 493 (II) (9th Cir. 1978) where the court in substance held that where the installation occurred before the sale or lease and thus before the purchaser or lessee had taken control and dominion over the plane (or box of chemicals in this case), the only ownership rights lay in the seller or lessor. Because the owner or lessor had full control and dominion over the item in question, it seemed logical to the court in the Miroyan case that the owner had the right to install any instrument that would not be physically dangerous to the purchaser or lessee. To the same effect (that the act of inserting the devices with the consent of the owner violated no one's constitutional rights, especially where there was no trespass into a transporting vehicle such as in the Holmes case (e. g., Dunivant placed the beepers into his car himself voluntarily, albeit unknowingly)) see, United

States v. French, 414 F2d 800, 803-804 (WD Okla. 1976). See also Smith v. Maryland, 442 U. S. 735 (99 SC 2577, 61 LE2d 220) (1979).

Thus as we view the several district and circuit courts which have examined this problem we find Holmes standing almost alone. Two cases that adopted the Holmes logic have been overruled. See United States v. Bobisink, supra, overruled by United States v. Moore, supra, and United States v. Martyniuk, 395 FSupp 42 (D Or 1976) overruled in 539 F2d 32 (9th Cir. 1976). Even the Holmes decision has been weakened in that the public policy foundation of that decision, while recognized as having great weight, has specifically been rejected based upon equally cogent policy reasons, in United States v. Curtis, 562 F2d 1153 (9th Cir. 1977). As was concluded in the appeal to the Martyniuk case, 539 F2d 32, at p. 34, a beeper installed in the drum of caffeine (a lawful substance but intended, upon a reasonable inference, to be used for an unlawful purpose) was nothing more than a probing, exploratory quest for evidence in which there was no reasonable expectation of privacy and thus no Fourth Amendment protection. The court there equated the quest as tantamount to the use of binoculars, tracking dogs, or searchlights as an aid in surveillance.

We are persuaded that the better rule is the one enunciated in the Dubrofsky, Moore, Curtis and Martyniuk cases, supra, i. e., that the mere insertion of a beeper device either in contraband (or in or onto an otherwise lawful object) does not violate any Fourth Amendment rights where there is no trespass involved and there exists probable cause to believe that a crime is intended. Our belief might be tempered somewhat by a case in which it is shown that there are no exigent circumstances,

probable cause exists, but a trespass is involved. In such a case, perhaps a weighing by an impartial magistrate might be required to protect the invasion involved in the tespass. Such seems to be an underlying caveat in the federal cases above considered. However, we need not reach a definitive answer as to the trespassory use of a beeper because the present case did not involve a trespass.

In determining whether there was probable cause to place the beeper in the box of benzyl-chloride, we look no further and are persuaded by the reasonableness of the holding of United States v. Moore, supra, p. 113 where the court held that a call from a drug company, the discovery that the address given by the purchasers was not one where a chemical manufacturer would operate, and the nature of the chemicals purchased, in light of the agent's familiarity with the manufacture of controlled substances, together created a sufficient basis for believing that a criminal enterprise was underway. Moore, supra, p. 113 (5). The facts giving rise to probable cause in that case almost track the facts of this case. We too conclude that there was sufficient evidence to give rise to a reasonable belief that a criminal enterprise was underway. The use of electronic beepers under such circumstances does not amount to an invasion of a constitutionally protected Fourth Amendment right to privacy nor an impermissible intrusion upon protected property rights. This phase of appellants' argument is without merit.

2. Appellants next argue that the search warrant obtained from the State Court of Carroll County was improperly issued. Their first contention is that the search warrant sought the seizure of chemicals that had been in the possission of appellants for several months without any showing where those chemicals had been or that what

was sought in July was indeed the same chemicals purchased in February. Thus, appellants argue that the information was stale.

This is an ingenious argument that facially has much merit. However, it ignores the reality of the situation. The evidence shows that specified chemicals had been ordered in type and quantity that were specific for the manufacture of methamphetamine, a controlled substance. Part of that order had not been filled and it was shown that the fabrication of methamphetamine was not possible without the use of the missing chemical which was part of the same order. It is reasonable to assume that if appellants had used up the chemicals delivered in February to manufacture methamphetamine prior to July, they would have ordered replacement chemicals to go with the benzyl-chloride finally obtained in July. The only reasonable conclusion is that because the quantity of benzyl-chloride accepted was from the same purchase order and fulfilled the requirement for the originally intended manufacturing effort, the original chemicals were still in the possession of the purchasers, particularly in the absence of the new procurement of those same chemicals in July. We conclude that the language of *Stiggers v. State*, 151 Ga. App. 546, 547 (1) (260 SE2d 413), though involving a right to exercise a momentary stop, is apropos. There we held that the Fourth Amendment does not require a policeman who questions the precise level of information necessary for probable cause based upon the facts available to him to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, it may be the essence of good police work to adopt an immediate response. We do not mean to imply here that probable cause did not exist, for we are satisfied that under the

totality of the information presented to the issuing judge, the only reasonable conclusion was that what was originally intended (the manufacture of methamphetamine) finally was to be accomplished by the appellants. We hold that the information furnished the issuing judge was not stale. See *Mitchell v. State*, 239 Ga. 456, 458 (2) (238 SE2d 100).

The second basis for the contention that the search warrant was improperly issued is that certain omissions or misstatements were made that mislead the issuing judge. These omissions and misstatements are alleged to be that the affiant did not disclose to the judge that beepers had been placed in the boxes of benzyl-chloride; that the tailing vehicles had temporarily lost contact with appellants' Blazer and had to rely on the electronic sounds to relocate the Blazer; that though the agents had had ample time to obtain judicial authorization to place the beepers in the boxes, no such authorization had been obtained; that an airplane had been used and became necessary to locate the vehicle carrying the benzyl-chloride; and, that the affiant had no positive knowledge that the chemicals delivered in February were at the Carroll County location or indeed where the chemicals had been since delivery in February.

As should be apparent from the preceeding discussion of the propriety of placing the beepers in the benzyl-chloride, we have already confronted all these objections. Inasmuch as the implanting of beepers in the chemicals occurred at a time when the substance was the property of the chemical manufacturer rather than appellants, no constitutional violation ensued at the time of the insertion. As to the transfer of the boxes with the beepers to the ownership of the appellants, we have held that

where there is probable cause to believe that a crime is intended or is being committed, the insertion of a non-recording device which acts only as an aid to and in effect is an extension of the senses of the surveilling officer, such insertion is a permissible intrusion and does not amount to an invasion of an area of privacy protected by the Fourth Amendment. For the same reason, it was not a misstatement that the officers had maintained contact with the Blazer throughout the entire journey for whether it was visible or audible, the contact was maintained by one of the senses or a proper extension of one of the senses of the surveilling officers. Also, because we have held that the use of a beeper under the facts of this case was proper, it was not misleading to the magistrate not to reveal that an airplane was used or that part of the time the beepers were essential to maintain contact, or that no judicial prearrangement or authorization had been obtained to insert the beepers in the benzyl-chloride. These are simply technical descriptions of how continuous surveillance was maintained. Lastly, in our discussion of the staleness issue, we conclude that it was reasonable for the affiant to relate and the magistrate to assume that the chemicals sold in February were still in the possession of the appellants, without any additional effort by the affiant to attempt to account for the whereabouts of those chemicals throughout the period from February to July. In short, we do not agree with the contention that the magistrate was mislead.

In the third facet of their argument, appellants contend that the face of the warrant fails to disclose probable cause. In support of this phase of their argument, appellants contend, cumulatively, (1) the fact that the information clearly was stale; (2) the fact that a computer check showed that Anthony had been a suspect in another state

of an investigation into manufacture of methamphetamine; (3) that the Chamblee address was not a manufacturing situs; (4) that the purchase and possession of benzyl-chloride is a lawful act; and, (5) that there is no connection between the July delivery of benzyl-chloride with the February chemicals, fails either individually or in connection to establish probable cause.

We have considered each of these arguments in other contexts within this opinion, with the exception of Anthony's earlier connection with an illegal methamphetamine operation. As indicated hereinbefore, we find ample evidence to satisfy the issuing judge of the probability that an on-going crime was being committed. Thus, we find this argument also to be non-meritorious. For all the reasons expressed herein, we conclude that appellants' two enumerations of error have no merit.

Judgments affirmed. Deen, C. J., and Sognier, J., concur.

APPENDIX B

CLERK SUPREME COURT
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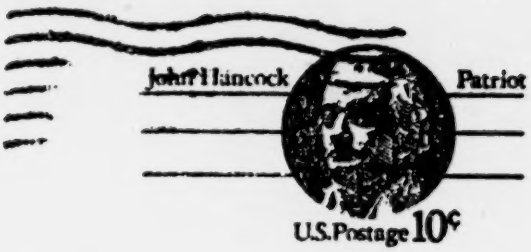

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CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta NOV 5 1980

Dear Sir:

Case No. 36912. Durevant et al. v. The State

The Supreme Court today denied the writ of certiorari in this case.
All the justices concur.

NOV 7 1980

Very truly yours,
MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX C

CLERK SUPREME COURT
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ATLANTA, GEORGIA 30334

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1980

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CLERK'S OFFICE, SUPREME COURT OF GEORGIA

NOV 26 1980

Atlanta 11/25/80

Dear Sir:

Case No. 36912, Dunevant v. The State

The Supreme Court today denied the motion for reconsideration on writ of certiorari in this case.

All the justices concur.

Very truly yours,

MRS. JOLINE B. WILLIAMS, Clerk